

1
2
3
4
5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
7

8 GREGORY RICHARDSON,

9 *Petitioner,*

10 vs.

11 ANTHONY SCILLIA, *et al.*

12 *Respondents.*
13

2:08-cv-01481-JCM-RJJ

ORDER

14 This habeas matter under 28 U.S.C. § 2254 comes before the court on respondents'
15 motion (#22) to dismiss and answer as well as petitioner's motion (#30) for a stay.

16 ***Background***

17 Petitioner Gregory Richardson seeks to challenge his 2006 Nevada state conviction,
18 pursuant to a jury verdict, of conspiracy to commit robbery, robbery with use of a deadly
19 weapon, and battery with use of a deadly weapon.

20 Respondents have filed, pursuant to the court's scheduling order, a consolidated
21 motion to dismiss and answer. The motion to dismiss seeks the dismissal of ground 1 as
22 noncognizable in federal habeas corpus and the dismissal of grounds 3 and 4 as procedurally
23 defaulted. The answer seeks the dismissal of the multiple claims of ineffective assistance of
24 counsel in ground 2 on the merits.

25 Petitioner filed a paper (#29) styled as an "Opposition to Respondents' Motion to
26 Dismiss." Petitioner did not respond therein to any of respondents' arguments seeking the
27 dismissal of grounds 1, 3 and 4. Petitioner instead referred, extensively, to a multitude of
28 claims that are not contained within the amended petition (#19) and that he maintains are not

1 exhausted. He requests that the court enter a stay pursuant to *Rhines v. Weber*, 544 U.S.
2 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005), so that he may return to state court to exhaust
3 the claims referred to in the opposition. The clerk has docketed petitioner's proposed order
4 to this effect separately as the motion (#30) for a stay. Respondents oppose the stay request
5 in their reply (#31).

6 ***Motion for Stay***

7 The motion for a stay will be denied.

8 None of the claims referred to in petitioner's filing (#29) currently are before the court.
9 For petitioner to present claims, he must file them in a properly-filed amended petition that
10 presents all of the claims that he seeks to pursue.¹ The attempted assertion of claims in a
11 reply to an answer or a purported opposition to a motion to dismiss has no effect. See, e.g.,
12 *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir.1994). Now that respondents have
13 filed an answer, petitioner can amend the petition under Rule 15(a)(2) only with respondents'
14 written consent or by obtaining leave of court to do so. In order to obtain leave of court to file
15 an amended petition at this late juncture in the case, petitioner would have to file a motion for
16 leave to amend the petition accompanied by the proposed amended petition. He further
17 would have to demonstrate that such a proposed amendment would not be futile given, *inter*
18 *alia*, that the federal one-year limitation period expired more than two years ago absent tolling,
19 a different accrual date, or relation back of claims.

20 The motion for a stay therefore will be denied. The court will not stay the case for the
21 exhaustion of claims that are not contained in a pleading properly before the court.

22 Nothing herein prevents – or has prevented – petitioner from seeking relief at any time
23 in the state courts, subject to whatever defenses or standards then might apply in any such
24 state court proceedings and/or in any federal proceedings thereafter.

25
26
27 ¹The court specifically informed petitioner – twice – that any amended petition filed must be complete
28 in itself, that the claims and allegations stated in the amended petition will be the only matters before the
court, and that any claims or allegations that are left out of the amended petition will not be before the court.
#10, at 2; #16, at 3. Petitioner has filed two amended petitions in this matter after being so informed.

1 Nothing herein prevents – or has prevented – any party from requesting any additional
 2 relief herein during the pendency of these federal proceedings, subject to whatever defenses
 3 or standards then might apply to any such request for relief.

4 ***Motion to Dismiss***

5 Under Local Rule LR 7-2(d), the failure of a party to file points and authorities in
 6 response to a motion constitutes a consent to the granting of the motion. Petitioner's filing
 7 (#29), while styled as an opposition to a motion to dismiss, contains no points and authorities
 8 responding to any of respondents' arguments seeking the dismissal of grounds 1, 3 and 4.
 9 Indeed, petitioner concedes that the claims in ground 1, when presented on direct appeal in
 10 the state courts, was "completely without merit."² Petitioner further presents no argument
 11 seeking to overcome the clear procedural default of grounds 3 and 4,³ and the burden is on
 12 petitioner to establish any such alleged basis to overcome the procedural default of the
 13 claims. Petitioner accordingly has consented to the granting of the motion to dismiss, which
 14 appears to be well-supported by the record presented.

15 The motion to dismiss accordingly will be granted as to grounds 1, 3 and 4. The court
 16 will reach and address the multiple ineffective assistance claims in ground 2 that remain for
 17 decision on the merits as promptly as the court's docket allows.

18 IT THEREFORE IS ORDERED that respondents' motion (#22) to dismiss is GRANTED
 19 and that grounds 1, 3 and 4 are DISMISSED with prejudice.

20 IT FURTHER IS ORDERED that petitioner's motion (#30) for a stay is DENIED without
 21 prejudice on the record and arguments presented.

22 DATED: March 16, 2011.

23
 24
 25 
 26 JAMES C. MAHAN
 United States District Judge

27
 28 ²#29, at electronic docketing page 12, lines 11-14.

³See #27, Ex. 36, at 5-6.